FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-5324

JULIA GONZALEZ ETC.,

Petitioner,

v.

JAMES F. YOUNG, DIRECTOR HUDSON COUNTY WELFARE BOARD, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

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POINT I

THE CONSTRUCT OF RESPONDENTS BRIEF IS PREMISED ON TWO ERRONEOUS POSITIONS: 1) THAT 1983 DOES NOT EMBRACE WHOLLY STATUTORY CLAIMS; 2) THAT 1343 CONTAINS A FUNDAMENTAL DISUNITY.

FIRST ERRONEOUS POSITION

The respondent attempts to vitiate the thrust of Points I thru III of petitioners brief by asserting that the phrase "and laws" in Section 1983 contains a particularized, narrow and technical connotation *viz* it embraces only two laws, namely the Civil Rights Act of 1866 and the Enforcement Act of 1870 (Brief for Respondent at 32). This perception is unsound. Indeed it is in disharmony with compelling judicial exposition.

> Although the original substantive provision [of 1983's precursor] had protected rights, privileges or immunity secured by the Constitution the provision in the Revised Statutes was *enlarged* to provide protection for rights, privileges or immunity secured by federal law as well (Emphasis added). *Lynch v. Household Finance Corporation,* 405 U.S. 538, 92 S.Ct. 1113, 1117 *n.* 7 (1972).
>
> As noted Congress in 1875 also *enlarged* the scope of 1983's predecessor to protect rights secured by federal law as well as rights secured by the Constitution. *See n.* 7 supra. *Lynch v. Household Finance corporation,* 405 U.S. 538, 92 S.Ct. 1113, 1120 *n.* 5 (1972).

These observations certainly impact the respondent's interpretation of the phrase "and laws". Moreover, the respondent's perspective is mired in redundancy. Thus he characterizes the rights embodied in the 1866 and 1870 Acts as being absolutely coequal with rights embodied in the Constitution, specifically in the Fourteenth Amendment (Brief for Respondent at 32). But if this is so the phrase "and laws" becomes completely redundant; indeed a feckless superfluity. But such an interpretation runs directly contrary to one of the guiding, indeed seminal, principles of statutory construction *viz.* no word, sentence or clause shall be

interpreted as superfluous, void or insignificant *Washington Market Co. v. Hoffman,* 101 U.S. 112 (1879), *U.S. v. Gooding,* 25 U.S. 460 (1827), *U.S. v. Menasche,* 348 U.S. 528 (1955). Obviously, if we accept respondent's contention the phrase "and laws" becomes all of these things, that is, it is rendered utterly superfluous, absolutely void and totally insignificant. Certainly this is unacceptable.

Respondent's perspective is inimical to the guiding principles of statutory construction in yet another way. It is axiomatic that the legislative intent can be derived only from the words the legislature uses and the court cannot speculate beyond the reasonable import of those words. *Gardner v. Collins,* 27 U.S. 58 (1829). Put differently, the spirit of an act must be exacted from the words of the act and not from conjectures aliunde *Gardner v. Collins,* id. To be sure, respondent's perception of the phrase "and laws" is openly hostile to this principle. Clearly if Congress intended the phrase "and laws" to have only the restricted and technical import divined by the respondent Congress would have used the phrase "Constitution and Civil Rights Act of 1866 and Enforcement Act of 1870" rather than the phrase "Constitution and laws".

Moreover the construction urged by the respondent is entirely incongruent with the historical period which germinated the phrase "and laws"! That period was marked by "an expansion of national authority over matters that before the Civil War had been left to the states." *Lynch, supra* at 92 S.Ct. 118. Clearly that expansion is impinged, indeed negated, if respondent's view is embraced. Shorn of its polemics respondent's argument entreats the court to engage in a process of revisionistic historicizing. This is unacceptable; in fact it is directly contrary to this court's previous

holdings. *See Lynch* supra at 92 S.Ct. 1113, 1120 n. 5 ("As noted Congress in 1875 also *enlarged* the scope of 1983's predecessor to protect rights secured by federal law as well as rights secured by the Constitution"); *City of Greenwood, Mississippi v. Peacock*, 384 U.S. 808, 86 S.Ct. 1800, 1813 (1966) ("Under 42 U.S.C. 1983 the officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws but for violations of other federal constitutional and statutory rights as well"); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 1361 and 1362 ("It is of course true that *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, L.E.2d 442 (1970) held that suits in federal court under 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States"). *Accord. Bowman v. Keyes*, 162 F.2d 136 (2 Cir.) *cert. den.* 332 U.S. 825 (1947), *Gomez v. Florida State Employment Services*, 417 F.2d 569 (5 Cir. - 1969), *Bass v. Rockefeller*, 331 F.Supp. 945 (S.D. N.Y. 1971), *Blue v. Craig*, 505 F.2d 830 (4th Cir., 1974).

SECOND ERRONEOUS POSITION

The respondent attempts to eviscerate the import of Point III of petitioners brief by contending that 1343 contains a fundamental disunity, to wit: one statute cannot satisfy both the "authorized by law" and the "Act of Congress" clauses of 1343 (Brief of Respondent 42, 43). This contention is erroneous. There is no antithetical necessity contained in these two clauses. Indeed their confluence is noteable since an Act of Congress is a law and a law (federal) is an Act of Congress. Impressment of logical analysis thus defeats rather than supports respondent's contention. Furthermore,

there is no succor in the language of 1343 for respondent's contention. Indeed if Congress intended the preclusion urged by the respondent, it cannot be gainsayed that it would have affixed a proviso clearly spelling out such a limitation. In addition even if such a preclusion were impressed it would not impact the Social Security Act's apposition to the "authorized by law" clause. Obviously the Social Security Act is a law. Equally obvious is the fact that nonadhering [to the AFDC provisions of the Social Security Act] states are subject to civil compliance suits. *Rosado v. Wyman, supra.*

Before completing this reply brief one further comment is imperative. Respondent makes much of the fact that a decision contrary to petitioner will effect minimum harm since petitioner can proceed with her substantive challenge thru fair hearings to state court. (Brief for Respondent at 40-41). In point of fact respondent has argued successfully in state court that an action grounded on a conflict between New Jersey welfare regulations and the Social Security Act *must* be brought in federal court *not* in state court. *See* the opinion of the Superior Court of New Jersey Appellate Division in *Atchison, etc. v. Klein, et als.* reproduced as Appendix 1a thru 4a to this brief. Obviously what respondent desires *sub judice* is to place petitioner in a jurisdictional imbroglio where jurisdiction rests neither in federal nor in state court. This approach should not, indeed cannot, be countenanced.

In short the respondents' views do not impact the conclusions set forth in the petitioner's brief.[1]

[1]The unmistakeable trend is to broadly interpret 1983 and 1343. *See* most recently *Monell v. Department of Social Services of the City of New York*, 46 L.W. 4569 (June 6, 1978) where the court held that local governmental officials and local independent school boards are persons within the meaning of 42 *U.S.C.* 1983. Respondent's position *sub judice*

(continued)

POINT II

PETITIONERS SUPREMACY CLAUSE CLAIM SATISFIES THE TESTS SET FORTH BY THE COURT AS ONE "SECURED BY THE CONSTITUTION" FOR PURPOSES OF ESTABLISHING JURISDICTION UNDER 28 U.S.C. 1343(3).

Respondents argue, in Point I of their brief, that petitioner's Supremacy Clause Claim is insufficient to confer jurisdiction under 28 *U.S.C.* 1343(3) as a claim "secured by the Constitution" in that resolution of the claim does not require any inquiry into the Constitution, operation, or effect of the Supremacy Clause. Respondents base this conclusion on the "time honored test" established by Justice Marshall in *Osborn v. Bank of the United States,* 9 Wheat. (22 *U.S.*) 738, 6 L.Ed. 204 (1824). In that case the United States Bank brought suit to enjoin the state auditor of Ohio from collecting a tax alleged to violate the U.S. Constitution. The Supreme Court found jurisdiction, based on an exclusive grant in the bond's charter which enabled it to sue, or be sued, in the Courts of the United States, consistent with the United States Constitution.

Justice Marshall, in language which has been cited in later cases as a test for determining the existence of a federal question for jurisdictional purposes, stated the following:

(footnote continued from preceding page)
is obviously inimical to the principle of broadly interpreting 1983 and 1343. *See* also *Regents of the University of California v. Bakke,* 46 L.W. 4896, 4902 (June 28, 1978) for the proposition that a narrow interpretation is disfavored in the face of a Congressional intent to establish a broad principle of federal law. In our case it is apparent that Congress enacted a broad legislative scheme of federal oversight. That being so respondent's position should be disfavored.

> "If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action, be made out, then all the other questions must be decided as incidental to this, which gives the jurisdiction." 9 Wheat. (22 *U.S.*) at 822

However, Justice Marshall's later analysis in the opinion reflects an even broader test for jurisdiction, holding that whenever some element of federal law is an "ingredient" of the claim jurisdiction exists:

> "We think, than that when a question to which the judicial power of the union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." 9 Wheat. (22 *U.S.*) at 823.

In addition to the fact that appellant's may have cited the holding of *Osborn* decision more restrictively than necessary for purposes of jurisdiction, a number of later cases dealing with this issue of what constitutes, "arising under the Constitution" for jurisdictional purposes have differed as to the meaning of this language.

There is language by Justice Holmes' to the effect that "a suit arises under the law that creates the action" *American Well Works v. Layne and Bowler Co.*, 241 *U.S.* 257, 260 (1916). Also Justice VanDevanter, in *Shulthis v. McDougal,* 225 *U.S.* 561, 569 (1912) held that for jurisdictional purposes, "a suit does not so arise unless it really and substantially involves a dispute or controversy re-

specting the validity, construction, or effect of such a law, upon the determination of which the result depends." This test, which is similar to *Osborn*, has been criticized by commentators on several grounds. One, that is contrary to the rule that jurisdiction has to be found in plaintiff's complaint. Also its application is faulty regarding those claims where defendant defaults, or there are only questions of fact, and the meaning of the constitution or federal law is not in issue. *Wright, Miller, and Cooper, Federal Practice and Procedures: Jurisdiction Sec.* 3562, footnotes 26, 27. In *Gulley v. First National Bank*, 299 *U.S.* 109 (1936) Justice Cardoza sets forth another test for jurisdiction as "arising under the Constitution" at page 118: "Controversies that are basic and those that are collateral; between disputes that are necessary and those that are merely possible." Finally several circuit courts have adopted the more recent test, proposed by Professor Mishkin, set forth in 53 *Col. L. Rev.* 157, 168 (1953) that for federal question jurisdiction there has to be "a substantial claim founded directly upon federal law." See *Johnston v. Byrd*, 354 F.2d 982, 984 (5th Cir. 1965), *Russo v. Kirby* 453 F.2d 548, 551 (2d Cir. 1971), *Mescalero v. Martinez*, 519 F.2d 479, 481 (10th Cir. 1975). The aforementioned cases all involve the issue of whether a claim arises under the Constitution or federal law for purposes of jurisdiction in Federal Court under Article III, Sec. 2 of the Constitution or 28 *U.S.C.* 1331. However the language of 28 *U.S.C.* 1343(3) is somewhat different i.e. "secured by the Constitution," and the cases interpreting this provision use language even broader and more encompassing than that contained in 28 *U.S.C.* 1331. Justice Stone, in *Hague v. C.I.O.* 307 *U.S.* 496, 526 (1938) defined the "secured by the Constitution" phrase as "rights protected by the Constitution and hence secured by it." Justice Brennan, in a separate opinion, in *U.S. v. Guest*, 383 *U.S.* 745, 779 (1966) found that:

> The term "secured" means "created by, arising under, or dependent upon," *Logan v. United States*, 144 *U.S.* 263, 293, rather than "fully protected." A right is "secured. . . by the Constitution" within the meaning of (18 *U.S.C.*) Sec. 241 if it emanates from the Constitution, if it finds its source in the Constitution.

While this Court has not had the occasion to consider whether the Supremacy Clause is a jurisdictionally conferring claim, under either 28 *U.S.C.* 1331, or 28 *U.S.C.* 1343, petitioners believe that this clause, in the instant case, meets the tests as historically set forth in the prior cases. At the center of a Supremacy Clause claim is the issue of whether federal law is consistent, or in conflict, with state law and if in conflict, is it to the extent that it violates the Constitution. This analysis has been stated by Justice White, in *Perez v. Campbell*, 402 *U.S.* 637, 644 (1971), "deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the Constitutional question of whether they are in conflict." It is clear from the opinion that this later step is not automatic, but involves an analysis of whether the challenged state statute "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress" *Hines v. Davidowitz*, 312 *U.S.* 52, 67 (1941). This accepted definition of the application of the Supremacy Clause, is used either to uphold, or invalidate, the state statute or regulation in question. Therefore, contrary to respondents analysis, this second step is not automatic and undisputed, but involves a

determination of the degree of frustration of the federal statute, which is constitutionally unacceptable. However, even if the application of the Supremacy Clause claim, in a given factual context involves little or no construction, and the conflict is evident when they are compared, the tests established in *Hague, supra,* and *Guest, supra,* are sufficiently inclusive for Constitutional purposes, to grant jurisdiction in the case at bar. As Justice Harlen stated, in *Swift and Co. v. Wickham,* 282 *U.S.* 111 (1965), "Any such pre-exemption or conflict claim is of course *grounded* in the Supremacy Clause of the Constitution."

This analysis of the Supremacy Clause would support a finding that it comes within the "secured by the Constitution" definition in *Guest, supra,* in that it "emanates from the Constitution, if it finds its source in the Constitution."

This showing, that a Supremacy Clause claim secures Constitutional rights, distinguishes it from the full faith and credit clause analogy of the respondents. The later clause having been held to be only indirectly, or peripherally involved in cases, and only applied by judges automatically after it becomes an issue in a pending case. See *Minnesota v. Northern Securities,* 119 *U.S.* 48 (1904). Also distinguishing the Supremacy Clause, from a full faith and credit clause, is the fact that the Supremacy Clause can be, and has been raised successfully by individuals as the sole claim involved. See *Townsend v. Swank,* 404 *U.S.* 282 (1971), *Carleson v. Remillard,* 406 *U.S.* 598 (1972).

Appellants further argue that a decision in *Quern v. Mandley,* ____ *U.S.* ____, 98 *S. Ct.* 2068 (1978) (decided after appellants brief was filed) holding that section 406(e) of the Social Security Act, 42 *U.S.C.* Sec. 606(e) is not binding on the states, would undercut petitioners Supremacy Clause

Claim. While this may be true as to the ultimate merits of the claim, it would not be the case for purposes of determining, from the complaint, the propriety of the jurisdictional dismissal directed by the third circuit. See *Goosby v. Ossner,* 409 *U.S.* 512 (1973) and *Bell v. Hood,* 327 *U.S.* 678 (1946).[2]

Finally, it is important to note the pragmatic consideration involved in this case. Appellants allege, that if this Court finds that the Supremacy Clause concerns rights "secured by the Constitution" within the meaning of 28 *U.S.C.* 1343, the federal courts will be inundated with all kinds of claims, from avocados to turkeys, under the guise of Civil Rights jurisdiction. While it is not difficult to particularize a claim which factually would seem inappropriate under 28 *U.S.C.* 1983, the vast majority of Supremacy Clause Claims effect significant federal - state interests. There is also no evidence to indicate that Supremacy Clause Claims would create a burden on the Federal judiciary. Furthermore, federal courts are the most appropriate forum to hear the case at bar, which involves a claim under the United States Constitution, federal monies under the Social Security Act, and an issue of fundamental importance to an individual in the lower economic strata of our society, who should be able to avail herself of a federal forum, no less so than those who can meet the judicial amount requirement under 28 *U.S.C.* 1331.

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[2]It must be stressed that petitioners' complaint has been dismissed *for jurisdictional reasons.*

CONCLUSION

For the reasons aforestated and for the reasons set forth at length in the brief of the petitioner this court should hold:

1). 42 U.S.C. 1983 is an Act of Congress providing for equal rights of citizens as required by 28 U.S.C. 1343(3).

2). 42 U.S.C. 1988 is an Act of Congress providing for the protection of civil rights as required by 28 U.S.C. 1343(4).

3). Since 1343(3), 1343(4), and 1983 are coextensive jurisdiction is established in the instant case even accepting arguendo the premise that the Social Security Act is not an Act of Congress providing for equal rights or for the protection of civil rights.

4). The Supremacy Clause satisfies the "secured by the Constitution" requirement of 28 U.S.C. 1343(3) thus providing an alternative basis for jurisdiction.

The judgment of the 3rd Circuit directing that the complaint be dismissed for want of jurisdiction should be reversed.

Respectfully submitted,

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APPENDIX

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1864-73

JULIA ATCHISON, KATIE BALDON
and ELIZABETH HOLMES,

Petitioners-Appellants,

v.

ANN KLEIN, Commissioner of the
State Department of Institutions
and Agencies; G. THOMAS RITI,
Acting Director of the Division of
Public Welfare; MICHAEL GALUPPO,
Acting Director of the Union County
Welfare Board,

Respondents-Respondents.

Submitted May 20, 1975 — Decided June 19, 1975.

Before Judges Carton, Crane and Kole.

On appeal from Division of Welfare, Department of Institutions and Agencies.

Mr. James J. Lynch (Union County Legal Services), attorney for appellants.

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondents (Mr. Richard M. Conley, Deputy Attorney General, of counsel; Mr. Paul Norman Watter, Deputy Attorney General, on the brief).

PER CURIAM

Appellants Atchison, Baldon and Holmes appeal a determination of the Division of Welfare, Department of Institutions and Agencies, sustaining the action of the Union County Welfare Board in terminating the public assistance benefits received through the Aid to Families with Dependent Children program (ADC), or, in the case of appellant Atchison, reduction of her benefits to the nominal sum of $3.00 per month. We reserved decision, pending consideration of the matter on the merits, on respondents' motion to dismiss the action for lack of jurisdiction.

In computing ADC grants, the recipient is required to submit a financial budget showing all sources of income. Persons in private employment are permitted to disregard $30 per month and one-third of the excess of their income in computing their total income. The regulation of the Division of Welfare prohibits the use of such "income disregards" by public service employment program employees. Thus, the central issue for decision is whether a county welfare board and the Division of Welfare, Department of Institutions and Agencies, may properly consider income earned from employment under the Work Incentive - Public Service Employment program in determining eligibility for ADC benefits.

New Jersey's Aid for Dependent Children program operates in the framework of a federal program and receives substantial federal funding. The Federal Aid to Needy Families with Children program is established as part of the Social Security Act under 42 *U.S.C.A.* 601 *et seq.* State eligibility for federal funds is contingent on the State's adoption of an assistance plan which satisfies the requirements of 42 *U.S.C.A.* 602. Failure to administer a State plan in accordance with Section 602 requirements can result in the withdrawal of federal assistance. The New Jersey Legislature has recognized the program's dependence on federal assistance, and by *N.J.S.A.* 44:10-3 has directed that the New Jersey program comply with federal requirements.

The State action complained of on this appeal is based on a State regulation which was adopted in accordance with the requirements of the United States Department of Health, Education and Welfare (HEW).

Appellants' basic contentions are that the New Jersey regulation under the authority of which the Union County Welfare Board acted in terminating or reducing their benefits, conflicts with the Social Security Act, 42 *U.S.C.A.* 602(a)(19)(1) *et seq.*, and that it is unconstitutional in that it discriminates between public service employment employees and other employees.

It is thus apparent that the attack on the State agency's regulation is in effect a challenge to the correctness of HEW's construction of a federal statute and the constitutionality of a regulation mandated by that construction. It is evident to us that HEW is an indispensable party to the granting of the relief sought by appellants. Since HEW is not a party and this court cannot compel it to be made a party, we conclude that this court should not attempt to exercise jurisdiction. Nor are we persuaded by appellants' secondary contention, that termination of ADC benefits was based in sufficient measure on policy decisions and actions solely within the State's discretion. It cannot fairly be argued that a judgment in their favor would not prejudice any interest of the United States Government or HEW. Nor is it correct that appellants can obtain relief only in the State courts at this juncture.

We note that the issues raised by appellants in this case are the subject of litigation in conflicting decisions in the federal

courts in Massachusetts, *Dunbar v. Weinberger,* Civil Action No. 74-882-F (D. Mass., decided August 7, 1974), and Vermont, *Betts v. Weinberger,* Civil Action No. 73-182 (D. Vermont, decided March 24, 1975), and it seems likely that the issue will ultimately be decided by the United States Supreme Court. Under the circumstances, we do not see how any hardship can be visited on the appellants by requiring that they bring an action, if they deem it desirable, in the federal court where HEW can be made a party. Any issues raised by appellants incidental to the primary issue of the alleged conflict with the Social Security Act and the claimed unconstitutionality of the act and regulations can readily be decided by that court on the basis of federal precedent. If they prevail in the federal court, they may then proceed in the appropriate State forum for any further relief to which they may be entitled.

The motion for dismissal of the appeal on which we heretofore reserved judgment is granted.

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Elizabeth W. Langlois

Clerk

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